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JOHN F. KEARNEY, LEGAL EDUCATION AND LIFE OPPORTUNITIES

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ABSTRACT

The author recounts the distinguished legal career of John Kearney QC, honorary graduate and benefactor. He identifies his strong commitment to equity in legal education as an issue requiring attention in Australia's law schools. He outlines recent development in a number of overseas countries, including the decline in available professional employment coinciding with large student debts, both in North America and Asia. He examines critically, suggestions in Australia for the superimposition of an obligation to undertake Bar examinations on top of university degrees and to discourage law as a generalist course. Finally, he refers to J.L. Goldring's surveys of the socio-economic backgrounds of law students in Australia. Because of the significance of values for the work of judges and practising lawyers, he suggests that surveys of backgrounds should be reinstated. They may suggest the need to encourage a wider cohort in the intake of Australia's law students.

HONOURING AN ALUMNUS

John Fouhy Kearney was born on 11 June 1923. He was educated at Xavier College, Melbourne and at the University of Melbourne. He was admitted to the Bar of Victoria and practised extensively in what we would now call environmental law. He was an active participant in international legal conferences. With his wife Alison, whom he had married in 1950, and with whom he had two sons and two

[*] Hon. LLD (Bond). Justice of the High Court of Australia (1996-2009).

daughters,he loved to travel. He was a lawyer engaged with the world and interested in ideas beyond the narrow conclave of the Australian legal profession.

John Kearney's distinction in the law was recognised in Victoria by his appointment in 1964 as Queen's Counsel. In 1966 he became engaged in the activities of the International Commission of Jurists, a link that he maintained into the 1980s, by which time I was elected a Commissioner of that body. In 1970, his professional distinction was recognised by his appointment to the Ground-Water Appeals Board of the Victoria. That position expanded in 1971 by his appointment as Chairman of the Town Planning Appeals Tribunal of Victoria: a post he retained until 1976, the year in which he was admitted a member of Middle Temple in England. Eventually, he moved his residence to Mudgeeraba in Queensland. He was admitted as Queen's Counsel to the Queensland Bar. And he established his links with Bond University.

Those links were to bear fruit in many generous acts of philanthropy. He made large donations to help found the John F. Kearney Law Library at Bond University to establish the Moot Court that bears his name; and to create the Legal Skills Building at Bond. Later, he and Alison Kearney made a generous donation to create the university library that is named after them. The donations continued with the Kearney Student Exchange Grant, dedicated to Bond students travelling overseas on exchange. He also inaugurated the John F. Kearney Gold Medal in Law. His have been the most substantial of private donations made to Bond University. He was also a generous donor to Griffith University Law School and to his old law school within Melbourne University.

Future law students and lawyers around Australia, and across the world, will have reason to honour John Kearney's name and the generosity of the gifts that he and his wife made for education. I too honour him as a philanthropist. But because I knew him, and met him frequently on visits to Bond Law School, I also acknowledge his quiet, dignified, engaging personality. He had bucket loads of Irish charm. Whilst he lived, he was faithful in attending virtually all of the dinners and events when I (and other visitors) came to Bond. He was proud of the Bond Law School; the excellence of the students that it attracted; the large cohort of overseas students;

the great successes in national and international mooting; and the brilliant faculty who helped give the University its distinctive character. He was admitted to an honorary doctorate of the University (as I later was, although much less deserving). He is thus an *alumnus* of Bond. It is right that, on his passing, we should honour him and celebrate his life. It is especially appropriate that, in this review, I should use the occasion to reflect upon recent directions of legal education. This was a cause that greatly interested John Kearney, for in it he saw the future of the profession he loved and respected for its place in the life of his country and in the world.

LEGAL EDUCATION: GROWING DOUBTS

For a long time, legal education in advanced common law countries, has been in a state of flux. After centuries in which, in England, the law was taught by a mixture of apprenticeship and part time professional instructors, the 19th century in the United States and the 20th century in England, Australia and elsewhere saw a shift to academic instruction in university contexts. Now, the tug-of-war between practitioners (often led by the judges) and scholars is again heating up. Perhaps, of its nature, it can never be finally resolved. Now there are new elements at work. They include concern about the limited numbers of placements available for law graduates in traditional legal employment and fresh anxiety about the increasing recruitment of overseas students to take up places in relatively high fees/low cost faculties of law, created as a business proposition, promoted by income-oriented universities.

These phenomena are mentioned in recent reports from the United States of America. In February 2014, Debra Cassens Weiss, writing for the American Bar Association, reported on a survey of lawyers who had originally passed the Bar examinations in 2000. This found a decline in the percentage of lawyers practising law and major differences in pay for those graduates based on considerations such as gender, law school ranking and personal grades.

Of the cohort of United States lawyers surveyed, 24% were not actually practising law by 2012. This compared to about 9% who had not been practising law at the first survey in 2003.

The work pattern of law graduates in 2000 has been monitored in 2003, 2007 and 2012. More than 3000 respondents answered the 3 wave survey. The source of concern for the leaders of the ABA was that the graduates surveyed were the so-called "golden age graduates", emerging from a law school of a time of high confidence about the future of legal practice. Most of those not practising had moved into the non-profit and education sectors; federal government; and business employment (commonly real estate agents, investment bankers). Women working full-time reported earning only 80% of the pay derived by male counterparts. The deficit in female earnings in the law was highest in business where women reported only 67% of the salaries of male counterparts. Women who were partners in law firms numbered 52.3%, compared to 68.8% for men. If attention were paid to equity partnerships, the differential was greater.

Perhaps surprisingly, the findings show quite high levels amongst the graduates of 2000 who were happy with their decision to attend law school. Increasing levels (8.4% to 27.7% to 44.1% in the next waves) who had drifted into business; and nearly 50% who, by 2012, had paid off their education debt.

It is this rising level of student debt in the United States that has led even President Obama to suggest the need for a reduction to 2 years in law school education, with a third year spent clerking for a judge or practising in a law firm.[1] In an attempt to improve access to justice, Washington State has been experimenting with limited licence legal technicians. These technicians are trained and licensed to handle limited and specified civil legal matters. The delineation between the future work proper to fully qualified law graduates and para legal personnel is bound to be a hot topic in a country where job availability for Bar graduates has significantly declined.

[1] Tamar Lewin, "Task Force backs changes in Legal Education System", *New York Times*, 20 September 2013, A14.

With the decline in student enrolment in the United States (described as "plunging"[2]), steps are being taken to reduce the protection of tenure for law school professors.[3] Some law professors are reported as expressing concern that, limiting job protections to law faculty staff could silence faculty who espouse unpopular positions or who take on controversial cases, prompting *alumni* or prominent donors who disagree to push for their dismissal. All of which demonstrates the pressures of change in legal education in the United States.

Another change, responding to the reported failure of 59% of United States universities to meet their enrolment goals in 2013, has been the efforts to attract new enrolments from international students to take up the slack. According to reports[4], the number of international students coming to United States universities has "soared". China is the chief source with 236,000 last year, followed by India (97,000), South Korea (71,000), Saudi Arabia (45,000). Thailand came in 20th at 7,000. An *alumni* journal in the United States expressed concern that "word on the streets of Bangkok is that unqualified applicants can purchase admission in any of the 8 Ivy League Colleges [in the United States]"[5]. A significant proportion of the overseas enrolments is being welcomed into American law schools, with their places emptied of many local applicants.

Similar problems are now also arising in several Asian countries. In August 2013, the chairperson of the Japan Association of Law Schools, in Seoul, warned Korean legal educators "not to repeat the mistakes that [Japan's] law schools have made"[6]. According to Mr Kaoru Kamata, who is also President of Waseda University in Japan, Japanese law school enrolment has been steadily declining since 2004. In that year there were 72,000 applicants to 68 law schools. However, the number of applicants has since dropped to 13,000. Mr Kamata's explanation is that:[7]

[2] D.C. Weiss, "24% of JDs who passed the bar aren't practicing law, survey finds", *ABA Journal*, 14 March 2014.
[3] "Law-School Professors Face Less Job Security", *Wall Street Journal*, 12 August 2013.
[4] *Fortune Magazine*, 24 February 2014.
[5] Ibid.
[6] Kim Ki-Hwan, "Korea Warned Against Japan's Law School Mistakes", *Joon-Gang Daily* with *International Herald Tribune*, 22 August 2013, 3.
[7] Ibid, *loc cit.*

> "Too many graduates have been churned out but not enough jobs are waiting for them. So many perceive legal job prospects as being not as good as they used to be".

Other speakers in the Seoul conference acknowledged that the position was similar in Korea. Dean Shin of the Yonsei University Law School stated:[8]

> "Here in Korea many law school graduates struggle to find a proper job."

Some of the foregoing developments have now appeared in Australia. The tension between the ideal of the law school that would "create a course of professional training"[9] and one that would view the law from the stand point of Critical Legal Studies was played out in the minor key at the law school of the University of New South Wales[10] and at La Trobe University's Department of Legal Studies[11]. The noise was raised dramatically at the Macquarie Law School, coming to a peak during the time I served as Chancellor[12]. Having myself been a beneficiary of the legal realism (extremely unusual for the time) of Professor Julius Stone at the Sydney Law School in the 1950s-60s, I could never understand why it was not beneficial to have each stream present and active in a university school of law. Or why unconditional surrender was the only option offered by some proponents of each point of view.

Currently, the University of New South Wales Law School is implementing changes to its curriculum developed by a curriculum review working party 2010-13. A competing stream of LLB and JD courses is now offered. The need for change is explained by reference to the "fundamental changes in the way in which law is practised"[13]. These changes include:[14]

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[8] Ibid, *loc cit.*
[9] Peter Nygh, Memorandum to Law School Staff, 5 July 1977 quoted in (1989) 5 *Australian Journal of Law and Society*, 57.
[10] Frank Carrigan, "They Make a Desert and Call it Peace" (2013) *Legal Education Review* 313 at 318. Many of his assertions are strongly contested.
[11] Ibid, 321.
[12] Ibid, 324.
[13] UNSW Law, "Curriculum Review – Designing an International Experiential, Research-Focused Curriculum for a C21 Law School", UNSW, 2014, 4. Cf. Via Io Lo, "Before competition and beyond complacency – the internationalisation of legal education in Australia" *Legal Education Review*
[14] *Loc cit.*

> "The internationalisation of legal issues; developments in legal markets, especially through realignment of firms; the growing centrality of regulation in all its forms; concern about ethics and values, especially in the light of some lawyers' contributions to the global financial crisis; responses to terrorism, and other systemic failures; and the increasing significance of the non-curial arena for dispute resolution."

The result has been an emphasis on 'vertical' themes that reflect both positivist and social realism objectives. Thus, equity and trusts becomes a compulsory course; as do new subjects of obligatory studies: Principles of Private Law and Principles of Public Law. A new core course on "Law in the Global Context" is introduced. So are new courses on Theories of Law and Justice; Lawyers, Ethics and Justice; and Legal Research and Writing.

Growing concern in the Australian legal profession about the arrival of employment trends similar to those happening in the United States is reflected in an important address given by Chief Justice Marilyn Warren of Victoria in April 2014 for Monash University Law School. On numbers, Chief Justice Warren pointed out that, in the United States, with ten times Australia's population, 45,000 law students were now graduating. In Australia, 12,000 law graduates are being produced each year. This is a figure that has grown by 107% since 2001. The number of those graduating with post graduate legal qualifications has grown by 330% in a decade[15].

According to Chief Justice Warren, recent surveys indicated that just 66% of law graduates would practise law as a profession. She indicated concern about class sizes; the market-driven conversion of the law degree to a generalised education; and the absence of some core legal subjects despite "agitation from the highest judicial levels". In this connection, she mentioned the need for a compulsory course teaching elements of statutory interpretation, a skill "fundamental to legal education and, inevitably, the application of the rule of law"[16].

[15] M. Warren, Fiat Justitia Lecture, Monash University, 25 March 2014. Noted C. Merritt, "Call of Cap on Lawyers to Ease Strain", *The Australian,* 4 April 2014, 15.
[16] *Ibid. Loc cit.*

I certainly agree about the desirability of special courses in statutory interpretation, rather than inclusion of that topic only as a sub theme of substantive legal subjects. But if the market demonstrates that there is a utility in a law degree for a wide variety of careers in the government, non-profit and business sectors, some will question the need to put caps on the intake. So long as new recruits (both national and international) are aware that professional jobs will not be waiting for many of them in the traditional legal vocations, no harm may be done. If market oversupply drives down lawyer salaries and makes the lawyers and law graduates of the future more available to less prosperous clients, so much the better. Undoubtedly, the discipline of learning about legal analysis is now essential in business where company officers must perform their entrepreneurial functions with the huge and complex contemporary laws about corporations at their elbow. The decline in the number of lawyers entering Australia's parliaments is a misfortune that needs to be corrected. Many new and different opportunities now await legal graduates, including overseas. Still, Australia's proliferating law schools need to be honest with their new recruits. Those from Australia need to be told that available professional jobs cannot expand indefinitely. Those from abroad need to be told candidly about the utility of an Australian degree for professional practice when they return home.

One thing is sure: that the changing character of the cohort of law students today, and the changing features of work available to them on graduation, will continue to have a significant impact on Australian law school curricula. And on the expectations, skills and interests of those who study and graduate in law. To the extent that law courses become less focused upon subjects regarded by the judiciary and the practising legal profession as "core", the pressure will grow for the judges to superimpose a requirement to undertake separate Bar admission examinations on top of university qualifications. If this necessity were added to the Australian trend towards JD degrees (with the extra year(s) of tertiary instruction they demand) a serious potential challenge would arise for the recruitment into the practising profession of law students from disadvantaged socio-economic backgrounds.

SOCIO-ECONOMIC FEATURES OF LAW INTAKES

This last thought brings me back to a theme that I have mentioned in many earlier observations on legal education, including recently[17]. Law is not, at least when practised in professional occupations, an ordinary job. It offers to its recruits a comparatively rare opportunity to get their hands on the levers of public power, without the irksome necessity of offering themselves for elected office or of enduring the generally arduous journey necessary to rise to the higher echelons of the public service. Advocates and judges, in particular, have significant influence upon the interpretation of the Constitution, of statutes and subordinate legislation and upon the development of the common law. This means that the people we recruit into law schools, to the extent that they will enter the branches of the practising profession, often come to exercise significant influence on the shape and direction of the law. This makes their values extremely important. Even those who do not accept totally the dogmas of the proponents of Critical Legal Studies will be obliged, if they are honest, to acknowledge the influence that values often play in the resolution of issues contested in the courts and tribunals.

A fine Australian legal academic, John Goldring, successively acquainted with law schools at Sydney University, UNSW, PNG, ANU, Macquarie and the University of Wollongong set out to analyse the intake of school students into Australian law schools by reference to the socio-economic backgrounds of their families. In doing so, he built on the research earlier undertaken by D. Anderson and J. Western[18], drawn to notice for its significance for the law, in 1977 by Julian Disney, John Basten, Paul Redmond and Stan Ross[19].

Goldring undertook two inquiries, with a decade in between, respectively in 1976 and 1986. In 1976 he found that 20% of the law students surveyed had fathers with incomes equal to, or less than, the average wage (then $9,000) and 24% had fathers

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[17] M.D. Kirby, "J.L. Goldring, legal education and a most unusual occupation" (2014) 38 *Australian Bar Review* 203.

[18] D. Anderson and J. Western, "Social Profiles of Students in Four Professions" (1965). See also D.S. Anderson and J.S. Western, "Notes on a study of professional socialisation" (1967) 3 *ANZJ of SOC*, 67; 'Social Profiles of Students in Four Professions' (1970) 3 *Quarterly Review of Australian Education*, 1.

[19] J. Disney, J. Basten, P. Redmond and S. Ross (eds), *Lawyers*, LawBook Co, Sydney, 1977, 136 at 140-1.

with incomes equal to, or above, $19,000. Goldring also found in 1976 that 42% of law students had a relative or family friend who was a solicitor, 24%, a barrister, and 15%, a judge. There may be overlaps within these groups of respondents. However, there was no way that 15% of the general Australian population in 1976 could have boasted a family member or friend who was a judge. That figure would then more likely have been fewer than 1%. Goldring's statistics demonstrated the generally privileged social background of law students in Australia at that time[20].

In his 1986 survey, Goldring noted a number of further key findings[21]:

- The figures showed a fairly sharp increase in the proportion of women entering law courses, even allowing for the number of non-responses on this issue in 1976. By 1986, the average of female entrants into law courses in Australia was 47%. In the Melbourne Law School, women had already achieved a majority (51%)[22].
- In 1976, at the four law schools surveyed, 86% of the new law students were 19 years of age or under, while in 1986, this percentage had dropped to 62%. In 1986 the proportion of older students was higher at Macquarie (14% over 26 years of age), UNSW (8%) and ANU (15%) than at Sydney (2%)[23]. An interesting survey response related to the educational background of law students. In 1986, approximately 70% of Australian students overall were educated in public ("government") schools. The survey conducted by Goldring in 1986 showed that only 41% of those entering Australia's law schools had been educated in public schools; 23% in Roman Catholic schools and 32% in private ("independent") schools. The biggest disparities in educational background were at the oldest law schools in Australia. Thus, at Melbourne University 42% attended private secondary colleges or schools and at Sydney Law School, 40%[24].

[20] Noted Disney et al, *op cit*, 139.
[21] J. Goldring, "An Update Social Profile of Students Entering Law Courses" (1986) 29(2) *Australian Universities' Review*, 38.
[22] Ibid, 40.
[23] Ibid, 39 (Table 3).
[24] Ibid, 40 (Table 6).

* Analysing the data in the 1976 survey, an overwhelming proportion of law students came from families in which the status of one or both parents was relatively high. 'The students are still likely to come from homes where the breadwinner is self-employed, or is employed in a professional, managerial or skilled occupation. The proportion of students who reported either parent as being in low status occupations, with the exception of Macquarie and NSWIT (later UTS) students, (where the bulk of the group is likely to be comprised of part-time students), is remarkably low.' [25]

From this survey in 1986, Goldring reached general conclusions important for the shape of legal education and the legal profession in Australia:

> "[T]here… is a need to provide access to legal education in Australia for students who lack the social and economic advantages which are a decided plus in both completing secondary education and in gaining admission to a law degree programme, and… Secondly, the most practical way of doing so is by expanding the opportunities for part-time or distance education in law… Part-time law teachers, who are usually busy solicitors and barristers, must give priority to the interest of their practices and their clients over the interest of their students and their teaching. Because they often have insufficient time for thought and reflection, the content of what they teach is seldom innovative or intellectually challenging, to the educational detriment to their students and to the long-term disadvantage to the community." [26]

Goldring's final comments concerned social mobility inherent in access to a law degree. He wrote:

> "Traditionally it has been accepted that the study of law has been a path for upward social mobility in Australia. It appears that, in the case of full-time study, this is not, and has not for some time been, the case for a significant number of law students. Law students in full-time courses remain an affluent and privileged group." [27]

[25] Ibid, 42 (Tables 14 and 16).
[26] Ibid, 43-4.
[27] Ibid, 44.

Professor Goldring, soon after his 1986 survey, accepted appointment to the New South Wales District Court and no further such surveys have been conducted. In a recent memorial lecture to honour his contributions to legal education, I urged the revival of the survey of the backgrounds of law students at decade-long intervals[28]. I suggested that this was necessary, in the circumstances of the substantial expansion of the number of Australian law schools; the continuing rise in the proportion of female law students; the big and growing influx of overseas law students studying in Australia; and the diminishing availability of traditional legal jobs, to scrutinise the types of persons entering upon legal studies and the emerging trends.

Wherever such law students end up, whether in traditional professional occupations or in government, business or non-profit organisations, the values of the law graduate are likely to have greater impact on work performance and outcomes than in the case of a student with a dental, veterinary or engineering background. Law is commonly a discipline about values. So the values of those who practise and apply its skills, are likely to matter. They will often impact on work outcomes.[29] In so far as they help to shape the law affecting other citizens, they are necessarily of concern to such citizens. This is a reason for monitoring arriving law students in Australia. And for tweaking the outcomes where important groups (such as indigenous, some distant, some ethnic and those from poorer socio-economic backgrounds) are shown to be under-represented[30].

CONCLUSION: AN ONGOING CHALLENGE

John Kearney understood the difficulties faced by law students coming from less favoured backgrounds. His donations to libraries (where they could study), to scholarships (where they might otherwise miss out) and to new law schools (without

[28] M.D. Kirby, Goldring Lecture, above op cit.
[29] These views of the author are not universal in Australian judicial and legal circles. Thus, former Chief Justice F.C. Brennan has expressed disagreement. See M. Pelly, *Murray Gleeson – The Smiler*, Federation Press, Sydney, 2014, 264.
[30] K. Petersen (ed), *Socio-legality: An Odyssey of Ideas and Context*, Federation, Sydney, 2013. See esp. I. Duncanson, "Socio-Legal Studies in the Ages of Empire and Businessman Bottles: An Historical and Political Account", *ibid* at 59, 67. David Neal, "Law and Power – Livin' in the '70s", ibid, 99 at 109. See also M.D. Kirby, "Online Legal Education in Australia: The new CQU law degree" (2011) 34 *Australian Bar Review* 196.

some of the established philanthropic subventions of the old) show his commitment to equal opportunity in legal education. That is a commitment made more significant in the context of recent developments in the intake of law students in Australia. It may be affected by recent Australian proposals to deregulate the levels of university fees for domestic students.[31] It is a concern made more relevant by research into the overall starting socio-economic background of Australia's law students. What is sure is that the debates about the purposes and content of legal education, and who should be admitted to it, will continue. Bond University, with its distinctive brand, must contribute to, and help to lead, those debates.

[31] This proposal was contained in the Federal Budget introduced into the Australian Parliament, House of Representatives, by the Federal Treasurer, the Hon. J. Hockey MP, on 13 May 2014.